

THE INTERIM

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REPRESENTATIVE DEMOCRACY -- IS IT TIME FOR LEGISLATORS TO GO BACK TO SCHOOL?

No, it doesn't mean that you have to go back to school to be a student, it means that you go back to school to share your legislative experiences with your young constituents. Last summer, Montana legislators were invited to participate in *America's Legislators Back to School Week* (see the July 2003 issue of **THE INTERIM** for prior coverage). Introduced by the National Conference of State Legislatures in 1999, *Back to School Week* is designed to teach young people about the importance of democracy. The program gives legislators the opportunity to go into classrooms in their districts to discuss representative democracy and what it means to be a legislator: the processes; the pressures; and the debate, negotiation and compromise that are the very fabric of representative democracy.

In 2002, only 13 Montana legislators participated in the program; this year, that number doubled. But we don't have to stop here. Although the third week in September was designated as *America's Legislator's Back To School Week*, you can still participate in the program; legislators visiting Montana's classrooms is what's important, regardless of when it takes place. Please consider taking the time to share your knowledge and experiences with the state's future voters and leaders. Resource materials and assistance are available from the Montana Legislative Services Division. Contact Krista Lee Evans at (406) 444-3957 or kevans@mt.gov or Lois Menzies at (406) 444-3066 or lomenzies@mt.gov.

REVENUE AND TRANSPORTATION COMMITTEE

Got Revenue?...Terry Johnson, Legislative Fiscal Division, offered a bit of good news on the financial condition of state government. According to unaudited information, the fiscal year 2003 ending general fund balance is \$46.4 million, or about \$29.9 million higher than what the Legislature expected when it left town in April. Johnson said that

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several factors contributed to the state's healthier bank account. First, revenue collections for the fiscal year were \$23.7 million higher than estimated in HJR 2. Individual income taxes, because of stronger wage and salary growth, and oil and gas production taxes, because of higher commodity prices, accounted for most of the increase. Taking into account prior year revenue adjustments, the total increase in revenue was \$17.6 million. Second, expenditures, including prior year adjustments, were \$9.5 million less than budgeted. Third, other accounting adjustments increased the fund balance by \$2.8 million.

Johnson also told the committee that the ending general fund balance for the 2005 biennium could range from \$68.8 million, or \$22.6 million higher than expected, to \$84.7 million, or \$38.4 million higher. The higher fund balance figure would include using money received under the federal Jobs and Growth Tax Reconciliation Act for calendar year 2003 and 2004 wildfire costs. Both estimates of the ending general fund balance take into account the state's 2003 and 2004 net wildfire costs and a \$17 million reduction in estimated revenue in fiscal year 2004 because of higher corporate tax refunds and lower investment earnings. Although the state's financial situation seems brighter than when the Legislature adjourned in 2003, Johnson told the committee that a structural imbalance is still possible if "revenue estimate variances or other fiscal issues are greater than the amounts" estimated. (See related article on page 12.)

Committee to Study the Valuation of Electrical Generation Property¹...Senate Joint Resolution No. 29, requesting a study of the valuation of electric generation property, was assigned to the committee by the Legislative Council. The resolution directs the committee:

- to study the taxation of centrally assessed properties, with a focus on utilities and utility properties; and
- to examine the Department of Revenue's method for the valuation of electrical generation property and gather enough information to determine whether methods differ among regulated utilities, exempt wholesale generators, and other centrally assessed properties.

The committee, among other tasks, will look at valuation methods applied to electric generation property in a regulated environment and in a restructured environment, focusing on the advantages and disadvantages of existing methods and alternative methods and how those methods might apply in Montana. The committee will also identify legal, policy, and fiscal issues related to the valuation of electrical generation property. Following a brief discussion, the committee adopted the study plan.

Property Tax Mitigation...Section 15-7-111, MCA, directs the Department of Revenue to periodically reappraise for property tax purposes residential and commercial land and improvements, agricultural land, and forest land. The last reappraisal cycle

¹For property tax purposes, not to buy.

began Jan. 1, 1999, and the new values for these types of property went into effect Jan. 1, 2003. According to Department of Revenue figures, the market value of residential property statewide increased by 21.4%, commercial property increased by 23.2%, and agricultural land increased by 15.3%.

Senate Bill No. 461, enacted during the 2003 legislative session, mitigated the property tax impact of higher market values. Dolores Cooney, Department of Revenue, summarized the provisions of the legislation. In addition to the 6-year phase-in of increased market values of property subject to periodic reappraisal, the exemption amounts for residential property (including rental property) will increase incrementally from 31% of market value in 2003 to 34% in 2008, while the exemption amounts for commercial property will increase from 13% to 15% (see 15-6-201, MCA). The tax rate applied to residential and commercial property and agricultural land will fall from 3.4% in 2003 to 3.01% in 2008 (see 15-6-134, MCA).

Residential property owners whose annual household income is less than \$75,000 are eligible for additional assistance in the form of a reduced tax rate if the taxable value of their property increased because of reappraisal by at least 24% and their tax liability would have increased by \$250 or more (see 15-6-193, MCA). An annual application must be made to the department to qualify for the additional relief. According to Cooney, applications were sent to 10,041 households that met the initial criteria. Of those applications, 3,718 were returned to the department, and 1,923 taxpayers, or 19% of the households that received an application, qualified for the additional relief.

Down the Road -- Highway 2 Construction...Dave Galt, director of the Montana Transportation Department, distributed a map of U.S. Highway 2 that shows the status of the 34 projects underway or planned for the 660 miles of highway that stretches from North Dakota to Idaho. The map indicates that 11 projects are under construction, 22 are in the 2003-2007 Tentative Construction Program, and one is in the Environmental Impact Statement phase -- the nearly 45 miles of Highway 2 from Havre to Fort Belknap.

Galt explained that because section 60-2-133, MCA, (Senate Bill No. 3, 2001 session) requires the Transportation Commission to "direct the department to construct a four-lane highway generally along the present route of U.S. highway 2 from the North Dakota border to the Idaho border," MDT will be advocating construction of four lanes from Havre to Fort Belknap as the preferred option in the EIS. However, section 60-2-133, MCA, also provides that MDT "shall seek additional federal funding that does not require a state funding match for the U.S. highway 2 project" and that MDT "may not expend any resources on the U.S. highway 2 project that would jeopardize any future highway projects." Galt told the committee that if construction of a four-lane highway is the final decision resulting from the EIS, MDT will be in a difficult position because there are no federal funds available for this project and no work would take place from Havre to Fort Belknap until those funds became available. Galt anticipates a final decision on the EIS in 12 to 18 months.

Federal Highway Funds...The Transportation Equity Act for the 21st Century (TEA-21) has been the vehicle for federal highway funds to flow to states for the past six years. TEA-21 expired on Sept. 30, and Congress has yet to agree on any new funding legislation. A 5-month extension of TEA-21 has kept apportionment and obligation

authority from being interrupted, but with no new 6-year plan in the immediate offing, MDT is concerned about the February and March contract lettings. The department is anxiously awaiting congressional action. Jim Currie, MDT deputy director, also reported that MDT has used all of its TEA-21 obligation authority and has applied for an additional \$4 million.

Highway Safety...Between July 1 and Sept. 20, 2003, 89 people died on Montana highways. Galt distributed a report that lists the name of each of the fatalities, whether the victim was wearing a seatbelt, and how many of the deaths involved alcohol. Of the 89 fatalities, 52 victims were not wearing a seatbelt, 21 were wearing a seatbelt, seatbelt use was unknown in 8 of the incidents, and in 8 incidents, the victim was operating a bicycle or four-wheeler or was a pedestrian. Galt's report indicated that alcohol was a factor in 26 of the 89 fatalities, was not a factor in 38 deaths, and alcohol involvement was unknown in 25 of the 89 fatalities.

MDT and the federal government are implementing highway safety initiatives and the topic will be on the agenda of each committee meeting of the interim. Please see "The Back Page" feature in the October 2003 issue of **THE INTERIM** for more information on MDT's highway safety program.

Committee to Meet in December...The committee is scheduled to meet Dec. 11 and 12 in Helena. On Friday, Dec. 12, representatives from *Global Insights, Inc.* (a national economic forecasting firm) and from the state will discuss economic trends that may have a bearing on the state's revenue. Other agenda items will be listed in next month's newsletter.

The Loop is Always Open...For more information about the Revenue and Transportation Committee, its work plan, or agendas, please visit the website (<http://www.leg.mt.gov>; follow the "Committees" or "Interims" links), or contact Jeff Martin at (406) 444-3595 or via e-mail at jmartin@mt.gov or Leanne Kurtz at (406) 444-3064 or via e-mail at lekurtz@mt.gov.

STATE-TRIBAL RELATIONS COMMITTEE

Committee Visits Fort Belknap Reservation...On Sept. 29 and 30, the State-Tribal Relations Committee traveled to the Fort Belknap Indian Reservation in north-central Montana. The reservation is home to the Assiniboine and Gros Ventre tribes. The purpose of the trip was to meet with the Fort Belknap Community Council and to tour the reservation.

On Monday morning, the committee met jointly with the community council. Tribal officials discussed issues of concern to the tribes, and tribal departments made formal presentations to the committee. Some of the issues discussed were:

- Gaming compact with the state: The tribes have presented a draft compact to the state but have yet to hear a response from the state.

- Reductions in TANF programs: Many tribal members are moving back to the reservation because of the reductions. This puts a burden on tribal programs.
- Law enforcement detention facilities: There is a need for a regional detention facility along Montana's Hi-Line.
- Road construction and improvements: Reservation roads are old and unsafe. They need to be improved in order to support tourism and agriculture.
- Higher education: Tribal colleges have an "open door" admissions policy, and many non-Indian students attend these colleges. Because the colleges do not receive federal money for these students, they would like the state to provide some funding. If not for tribal colleges, many of these non-Indian students would not have access to higher education. Tribal colleges would also like to see a tribal college representative on the Board of Regents.
- K-12 education: There is a need for more Indian teachers and more Indian culture classes in the public schools.

Committee Tours Reservation Facilities...After the joint meeting, the committee began its tour of tribal facilities with a stop at the tribal Head Start program. Head Start has been on the reservation since the mid-1960s and will be moving into a new building within the next few months.

The committee visited the Harlem public schools where the superintendent, high school principal, and director of Indian education programs discussed the school district's efforts to incorporate Assiniboine and Gros Ventre culture and language into the curriculum. The committee also visited some classrooms.

A tour of the new Indian Health Service Hospital, built in 1998, was the last stop of the day. The facility is a critical access hospital with six beds, two emergency room bays, and two observation beds. The hospital offers mammogram, x-ray, physical therapy, and dental services as well as general medical care. For patients on dialysis, the hospital contracts with Northern Montana Hospital in Havre. The hospital would like to have its own dialysis unit, but the IHS is reluctant to fund such units and even if it did, water problems on the reservation preclude the operation of a dialysis unit. Diabetes is a major health problem among the Indian population, so the hospital runs a diabetes program that does extensive screening and offers community awareness activities such as health fairs and summer camps for children.

Committee Holds Public Hearing...Monday evening, the committee held a public hearing at Fort Belknap College. The White Feather Dancers, a group of Indian youth from the reservation, started the evening with performances of an Intertribal Dance, a Grass Dance, a Fancy Shawl Dance, and a Jingle Dress Dance. The committee then heard testimony on the HJR 8 study of American Indian students who drop out of school and listened to other issues that tribal members had. About 50-75 people attended the hearing.

Representatives of the Harlem public schools described their efforts to lower the dropout rate. Superintendent Neil Terhune said that children will come to school if they feel welcome, if the school honors their culture, and if they can experience success. Nancy Coleman, principal of the junior and senior high schools, discussed the advisement program, a program designed to help keep students in school. The program increases communication among students, parents, and teachers; fosters strong relationship between a student and the student's advisor; develops a list of positive assets that can be encouraged at school and links those assets to the curriculum; and provides professional development opportunities for teachers and administrators to implement the advisement program. Nancy Stiffarm, director of Indian education for the Harlem public schools, discussed cultural activities at the schools and how they have helped keep Indian students in school.

Several parents from Harlem and from Hays-Lodge Pole expressed their concerns about the schools where their children attend. Some of the concerns were:

- teachers need to learn how to teach Indian children;
- a holistic approach to the dropout problem should be developed; parents, school, and community must be involved;
- there should be a line-item in the state budget for dropout prevention;
- the schools need more Indian teachers;
- teachers don't live in the communities in which they teach and they don't send their children to the schools in which they teach; some even send their children to private schools;
- drug and alcohol problems on the reservation need to be addressed; an arrangement between counties and school districts needs to be worked out because districts look at treatment while counties look at incarceration;
- more education about Indians is needed in our schools because discrimination still exists in non-Indian communities;
- there should be more activities for children after school and during the summer;
- school districts need to explain "No Child Left Behind" to parents and communities; and
- things are generally much better for Indian students in the schools today, but there is still room for improvement.

Several other issues brought to the committee during the public hearing included:

- the need for job training/vo-tech programs at tribal colleges;
- the need for an Indian on the Board of Regents;
- the need for training and assistance from the state for reservation volunteer fire departments;
- tribal governments should have the first opportunity to acquire state and county surplus equipment;
- collaboration between Montana State University and natural resource programs at tribal colleges; and
- better understanding of the allocation of certain federal funds available to tribes and administered by the Department of Fish, Wildlife, and Parks.

Committee Tours Southern End of Reservation on Second Day...On Tuesday, the committee traveled to the southern end of the reservation. At Hays, the committee visited the Head Start program, St. Paul's Mission School, the Hays Health Clinic, and Hays-Lodge Pole High School. The committee toured the soon-to-be-completed elementary school at Lodge Pole and visited the Senior Citizens' Center where Minerva Allen, tribal elder, presented gifts to committee members. Tribal game wardens drove the committee up Mission Canyon in the Little Rockies to the tribal powwow grounds.

Committee Tours Landusky Mine Site...The committee finished its visit to Fort Belknap with a tour of the Zortman-Landusky mines in the Little Rockies. The tour was led by Wayne Jepson of the Department of Environmental Quality.

The location of the mines was originally part of the Fort Belknap Reservation. The area was ceded to the federal government in 1895 after gold was discovered there. The treaty assured the Gros Ventre and Assiniboine tribes that their water rights would be protected and they would retain enough water for their uses for all time. Underground mining occurred in the area from the 1890s through the 1970s. In 1979, the Pegasus Gold Company began large-scale, open-pit mining operations in the Little Rockies, using a process known as cyanide heap leaching. The mines closed in 1998 because of falling gold prices, the Pegasus bankruptcy, and, in part, because of lawsuits filed by the Gros Ventre and Assiniboine tribes. The DEQ is currently directing the land reclamation and water treatment activities and operating water treatment plants at the mine sites. The tribes argue that the reclamation efforts are ineffective, insufficient, and underfunded and that water discharges from the mine site will require treatment efforts indefinitely. The tribes are seeking additional funding over and above the \$29 million in bonds received after the Pegasus bankruptcy to implement better reclamation plans and more extensive water capture and treatment systems.

Because of time constraints, the committee only toured the Landusky mine site. Jepson pointed out the leach pads where the ore was deposited and soaked with cyanide. He explained how the process worked and the damage that resulted. He also explained how the mine pits are being reclaimed in order to minimize the environmental

damage. The committee also visited the two water treatment plants, one of which is a state-of-the-art bio-treatment plant. Most of the committee members had never visited an open-pit mine site and came away with a better understanding of the resulting environmental damage.

Committee to Meet in December..The committee will meet in Helena on Friday, Dec. 5. The committee will discuss the issues brought up during the Fort Belknap visit and what the committee can do to address the issues.

For further information about the committee, please contact Connie Erickson at (406) 444-3078 or at cerickson@mt.gov. Information is also available on the committee's website. Just log on to <http://leg.mt.gov> and follow the links through "Committees" or "Interims."

To be placed on the committee's mailing list, please contact Dawn Field at (406) 444-3073 or at dfield@mt.gov.

SJR 32 SUBCOMMITTEE ON MEDICAL LIABILITY INSURANCE

Subcommittee Meeting in Billings, Nov. 16 and 17...The SJR 32 Subcommittee, created by the Legislative Council and commissioned to study medical liability insurance issues, is meeting in Billings on Sunday and Monday, Nov. 16 and 17. The subcommittee will meet Sunday, Nov. 16, from 6:30 p.m. to 9:30 p.m. at the Deaconess Billings Clinic (Deaconess Hospital) in the Mary Alice Fortin Health Conference Center, Rooms B and D . The subcommittee will meet all day Monday, Nov. 17 at St. Vincent's Hospital in the Mansfield Health Education Center.

The agendas are full as the subcommittee reviews a legal history on medical liability law in Montana (constitutional, statutory, and case law) and a briefing on the purpose, duty, and authority of the Montana Medical Legal Panel. The subcommittee will also examine and consider how other states have reacted to medical liability insurance premiums and availability issues and hear reports on surveys undertaken by, respectively, the Montana Hospital Association, the Montana Medical Association, and the American Insurance Association. The subcommittee will also engage in a work session intended to focus the work of the members, the staff, and the stakeholders.

The subcommittee will take testimony at both the Sunday evening and Monday morning sessions. Video teleconferencing will be used at the Monday morning session and possibly at the Sunday evening session, although the availability for Sunday has not been confirmed.

Information Available Electronically or Personally...More details of the meetings, past and future, are and will be posted to the subcommittee's website as they become available.

For further information, please check the subcommittee's website, or contact Dave Bohyer of the Legislative Services Division by phone at (406) 444-3064 or by e-mail at dbohyer@mt.gov.

ENVIRONMENTAL QUALITY COUNCIL

Council Meets in October... The Environmental Quality Council met Oct. 8 and 9 in Helena to finish up the details of its interim work plan and to adopt the work plans of its two subcommittees. Other business included a panel discussion on the potential for the increased use of biodiesel in the region and a review of biodiesel pilot projects underway in the state.

The EQC also discussed the status of Montana's Total Maximum Daily Load (TMDL) program. Art Compton, Department of Environmental Quality, presented an overview of the program, reported on the progress on TMDLs to date, and discussed how DEQ plans on completing the remaining court-ordered TMDLs by 2007. John Youngberg, chair of the state technical advisory group, provided the EQC with suggestions from the advisory group.

HJR 4 Presents Challenges... House Joint Resolution No. 4 requested an interim study to investigate options for improving the supply and distribution of water in Montana and to evaluate the water storage policy established in section 85-1-703, MCA. Because of the broad scope of the resolution, the EQC faces several challenges in completing the study, and it spent a lot of time discussing the focus of the study. A panel of water policy experts provided its collective insight on the primary water policy issues facing the state. The panel included Chief Water Judge Bruce Loble; attorneys Holly Franz, Stan Bradshaw, John Bloomquist; and Jack Stults, Department of Natural Resources and Conservation. After hearing from the panel and discussing the issues among themselves, the EQC decided to concentrate its efforts on the following:

- water adjudication: accuracy; enforcement; federal reserved rights; institutional objectors; user fees; and water right permit and change process;
- surface water/ground water interconnection;
- cooperation with DNRC on updating, printing, and distributing the *Water Rights Handbook*;
- capture and use of flood waters;
- water banking as a means to alleviate water shortages;
- options for improving the supply and distribution of water;
- development of offstream storage facilities; and
- evaluation of the water storage policy provided in 85-1-703, MCA.

The EQC incorporated the HJR 4 study in its work plan and is soliciting public comment about the water policy issues that it has decided to study. Staff is developing

an electronic form to gather public comment. The form will be available on the EQC website; please take a minute to complete the form.

If you have questions or need additional information regarding TMDLs or HJR4, please contact Krista Lee Evans at (406) 444-3957 or kevans@mt.gov

HJR 43 Zortman and Landusky Water Issues and Mine Bonding... The Department of Environmental Quality reported on the reclamation of the Zortman and Landusky mine sites. DEQ indicated that land reclamation at the Zortman mine is nearly complete. DEQ has spent nearly \$11.5 million in reclamation bonds, Bureau of Land Management funds, and state Resource Indemnity Trust funds. However, DEQ believes that at least \$1.5 million is still needed for reclamation at Zortman. At the Landusky mine site, land reclamation is nearly complete on one-third of the site. Funds for reclamation costs of about \$16.6 million have come from reclamation bonds and BLM funds. Again, DEQ believes that at least \$1.75 million is still needed for reclamation at Landusky. Also, current and long-term costs of water treatment plant operations are insufficiently funded.

DEQ also reported on the status of metal mine bonding in Montana and on efforts to upgrade the reclamation bond coverage for existing mine operations. The price of surety bonds for metal mines is increasing at the same time that the profitability of metal mines is weakening. Many metal mines operators are finding it difficult to cover the anticipated costs of reclamation in accordance with state laws and the constitution.

EQC Agency Oversight Subcommittee... The Agency Oversight Subcommittee adopted a work plan at its Oct. 8 meeting. The work plan is posted on the EQC website. The Department of Environmental Quality presented the results of its compliance and enforcement efforts for the past 3 years. A presentation on the status of the Holcim Inc. air quality permit, which would allow the firm to supplement its fuel costs by burning waste tires in its kiln, drew considerable discussion. It appears that most of the cost of an estimated \$200,000 environmental impact statement will be borne by the state. The subcommittee also reviewed proposed rule making by the DNRC and the DEQ. For more information on subcommittee activities, contact Larry Mitchell at 444-1352 or lamitchell@mt.gov

Energy Policy Subcommittee Sets Goals... The Energy Policy Subcommittee met on Oct. 8. The subcommittee adopted its interim work plan, which was subsequently approved by the full EQC. The interim goals of the subcommittee are to gather information on biodiesel, hydrogen fuels, ethanol, distributed wind energy, and fossil fuels that interrelate with alternative energy sources. The subcommittee will also monitor federal energy legislation during the interim. The subcommittee is scheduled to meet Jan. 14, 2004, in Room 137 of the state Capitol. For more information on subcommittee activities, contact Todd Everts at (406) 444-3747 or teverts@mt.gov

Next Meeting in January... The EQC and its subcommittees will meet in Helena on Jan. 14 and 15, 2004. Minutes of past meetings, draft meeting agendas, and additional information about the Environmental Quality Council are available on the EQC website at <http://www.leg.mt.gov/css/lepo>, by calling (406) 444-3742, or by e-mailing mtheisen@mt.gov.

LEGISLATIVE COUNCIL

Council Takes Action, Identifies Issues... The Legislative Council held an evening meeting on Sept. 22 and a planning session on Sept. 23. During the evening meeting, members:

- consulted with the Department of Natural Resources and Conservation on the proposed sale of the Bozeman and Whitefish armories;
- adopted rules of procedure for the current interim;
- approved prices for the annotations of the Montana Code Annotated; and
- received status reports on state revenue collections and expenditures, legal challenges to state statutes, codification of session laws, and Television Montana (TVMT).

During the planning session, members participated in a series of small and large group exercises to identify issues to pursue during this interim and beyond. The council will prioritize these items and form working groups to develop strategies for addressing the issues.

Council to Meet in January... The council's next meeting is Friday, Jan. 16, 2004. For more information about the Legislative Council, call Lois Menzies at (406) 444-3066 or send an e-mail message to lomenzies@mt.gov.

ENERGY AND TELECOMMUNICATIONS COMMITTEE

Committee to Meet in November... The Energy and Telecommunications Interim Committee will meet Nov. 20 in Room 102 of the Capitol. Although the starting time has not been determined, a full day is anticipated. The final agenda for the meeting has not been set, but the topics and activities listed below will be taken up by the committee.

Transmission of electricity. Investigating concerns about transmission of electricity is a top priority for the committee. Expansion of transmission capacity and enhancement of existing capacity are key to increasing exports of electricity from Montana to other states as well as to creating more competitive market conditions. The committee will be briefed on various initiatives to address the capacity and reliability of the transmission infrastructure.

Universal system benefits. Over the course of the interim, the committee will evaluate universal system benefits charges and the use and disposition of universal system benefits funds. Universal system benefits charges are assessed on electricity and natural gas ratepayers. The charges are used to pay for low-income energy assistance,

acquisition or support of renewable energy, and energy conservation activities.

Public Service Commission authority over certain utility transactions. The PSC will present information about the type of authority that it is seeking. The committee will consider the advice of the Governor's Consumer Energy Protection Task Force, which made recommendations regarding PSC authority to review transfers and sales of property used to provide regulated utility services. The committee is seeking public comment on this concept and will allocate time to hear testimony from interested persons.

Committee members and staff continue to monitor the NorthWestern Corporation bankruptcy proceeding. A special page on the committee's website (see below for the address) has been dedicated to bankruptcy and is updated frequently. "The Back Page" article in this issue presents the basics of utility bankruptcy.

Want to Know More?... A meeting schedule, agendas, background information, links, and other information may be viewed on the committee's website. To get to the website, go to "<http://leg.mt.gov>," click on "Committees," then click on "Interim." For more information or to be added to the mailing list (both snail mail and e-mail options are available), contact Mary Vandenbosch at (406) 444-5367 or mvandenbosch@mt.gov.

LEGISLATIVE FINANCE COMMITTEE

October Meeting... The Legislative Finance Committee (LFC) met on Oct. 3. The committee heard reports on a variety of current or emerging fiscal issues, the highlights of which are discussed below. The reports are available on the Legislative Fiscal Division website at <http://www.leg.mt.gov/css/fiscal/lfc.asp> along with other committee information. For further information, contact Clayton Schenck at cschenck@mt.gov or at (406) 444-2986.

General Fund Update... Staff reported that, based on current information, the general fund account would end the 2005 biennium with a balance of \$68.8 million, or \$22.6 million more than anticipated. If the federal grant funds are combined with the general fund account, the combined balance would be \$84.7 million, or \$38.4 million more than anticipated by the 58th Legislature. Although this potential excess is good news for state finances, it should be noted that this amount represents what is left of the \$98.9 million (see the table on the following page) in additional funds that was not anticipated by the Legislature. If revenue estimate variances or other fiscal issues are greater than the amounts shown in the table below, the excess funds may be needed to maintain an adequate ending fund balance.

Potential Funds Available For Other Fiscal Issues	
General Fund Account Plus Federal Grant Funds (In Millions)	
	2005
<u>Budgetary Item</u>	<u>Biennium</u>
Budgeted Ending Fund Balance	\$46.218
<u>Current Known Fiscal Issues</u>	
Federal Relief Grant Funds	50,000
Federal Relief FMAP Increase *	19,029
Unanticipated Fiscal 2003 Balance	<u>29,883</u>
Sub Total	\$98,912
US Mineral Royalty Transfer	(4,674)
Continuing Appropriations	(2,086)
Protested Property Tax	(3,772)
Debt Service	1,411
<u>Current Estimated Other Fiscal Issues</u>	
State WildFire Costs 2003 Season (Net)	(27,101)
Revenue Estimate Variances	(17,200)
State WildFire Costs 2004 Season (Net)	(7,045)
<u>Current Unknown Other Fiscal Issues</u>	
Potential Supplements	
Legislative Audit Adjustments to Fiscal 2003	
Impact of NorthWestern Chapter 11	
Potential Ending Fund Balance	\$84,663
Budgeted Ending Fund Balance	<u>46,218</u>
Potential Funds Available For Other Fiscal Issues	<u>\$38,445</u>

* Adjusted for FMAP increase included in fiscal 2003 ending fund balance

For further information, contact Terry Johnson at tjohnson@mt.gov or at (406) 444-2952.

Wildfire Costs...Although the official 2003 fire season is over, the threat of fire danger is still looming. According to the most recent cost estimates, as of Oct. 10, 2003, the net cost of state fires after reimbursements is estimated to be **\$27.2 million**. The total fiscal year 2004 state fire costs were estimated to be \$65.8 million. Of that total, \$2.5 million was incurred as a result of sending people and equipment to assist other state and federal entities; these costs are reimbursable.

Further, some of the fires are Federal Emergency Management Agency eligible. Thus, in addition to reimbursable costs, FEMA will pay a portion of fire costs. Estimates indicate that about \$36.1 million of the total fire cost is FEMA eligible.

To pay for the fire costs that have come due, the executive branch has used \$27.1 million of the Federal Jobs and Growth Tax Reconciliation Act money granted to the state. Although states of disaster and emergency have been declared, there have

been no statutory appropriations established to pay for fire costs with the governor's emergency fund.

Over the last seven years, the average total fire suppression cost has reached \$18.3 million while the average net cost is just over \$7 million. To arrive at those figures, fire costs over the last seven years are averaged after the high and low cost years are removed. The following table shows both the total and net average costs of suppression:

Net Cost of Fire Suppression			
Fiscal Year	Total Cost	Reimbursements	Net Cost
1998*	\$870,638	(\$97,297)	\$773,341
1999	8,303,438	(2,402,172)	5,901,266
2000	5,205,614	(914,375)	4,291,239
2001	54,925,104	(44,784,017)	10,141,087
2002	16,417,193	(3,549,700)	12,867,493
2003	6,710,688	(4,684,927)	2,025,761
2004 (estimate)*	65,782,139	(38,558,469)	27,223,670
5 Year Average Cost	\$18,312,407		\$7,045,369
7 year Average Cost	\$22,602,116		\$9,031,980
(high and low included)			

* Not included in the 5 year average calculation

The Department of Natural Resources and Conservation has recently formed a study group to examine funding issues associated with wildfires. Participants include department personnel, landowners, fire fighters, and legislators. The first meeting, held on Oct. 8, included an overview of the current funding structure and a discussion of problems associated with funding. The next meeting is tentatively scheduled for Dec. 9. For further information regarding wildfire costs, contact Gary Hamel at gahamel@mt.gov or by phone at (406) 444-5347.

State Budget Process... Legislative Fiscal Division staff presented a report titled the "State Budget Process." The purpose of the report was to examine the state budgeting practices in Montana and other states and to provide the committee, the Legislature, and other interested parties a better understanding of the Montana process and the methods used by budget agencies in other states. The report described the budgeting models that are available and used to some degree by various entities. The models include the traditional incremental approach, the program-based approach, the performance-based approach, and the zero-based approach. The report then described the Montana budget process, which is primarily an incremental approach but also includes elements of the other models. Finally the report reviewed the budget methods used in other states, most of which are predominantly incremental approaches.

Despite its shortcomings, the incremental approach seems to be favored because it is the least complex and offers the most flexibility. The other approaches are more cumbersome in planning, implementing, and measuring and typically require

considerably more paperwork and resources. Many states, including Montana, have attempted to address the shortcomings of the incremental approach by incorporating features of the other approaches; for example, applying performance measures, appropriating by program, or examining the budget base by requiring state agencies to justify at least a portion of the base programs, programs that have usually been in existence for many years. The Montana approach has evolved over the years, and reforms to the process have come and gone.

The Montana budget approach continues to be a subject of concern among legislators and other interested parties. The most common complaint is that it allows too much growth in the budget. The blame is often pointed at the concept of "present law adjustments" and at programs that seem to be uncontrollable such as Medicaid and corrections, where caseload and/or unit costs seem to march to the beat of a different drum. Many factors affect the growth in the state budget, and the Legislative Fiscal Division will be studying the factors that contribute to the growth in the budget. The purpose of the study is to give legislators a better idea of those factors over which the Legislature might exercise control in the budget process. Legislators are invited to send their comments and concerns regarding the budget process to Jon Moe at jonmoe@mt.gov or by telephone at (406) 444-4581.

Status of TANF Caseload...The committee heard a report summarizing a number of actions and events that have occurred since the end of the legislative session that impact the availability of federal Temporary Assistance For Needy Families funds. During the 2003 legislative session, the Legislature heard testimony regarding a potential reduction in the monthly cash benefit paid to TANF eligible families, due to two reasons: 1) increasing caseloads; and 2) because the Legislature increased the appropriation for childcare subsidies by \$3 million and reduced the appropriation for cash assistance by a like amount. After the Legislature adjourned, the Department of Public Health and Human Services adopted administrative rule changes and implemented a reduction in the monthly cash assistance payment effective Aug. 1, 2003. This change, which reduced the benefit standard from 40.5 percent of the 2002 federal poverty level to 30 percent of the 2002 federal poverty level, impacted both the monthly cash payment and the income level at which families are eligible to receive cash assistance.

Although it is difficult to estimate the impact on an individual family, the department estimated that for an average family of three this change would reduce the cash payment from \$507 a month to \$375 a month, or by about 26 percent. Department staff anticipated that when implemented, the change in the monthly payment would decrease the cash assistance caseload and costs. Consistent with this expectation the caseload dropped between July and August this year from 6,185 to 5,731 cases, a decrease of 454 cases, or 7.3 percent. The department's cash assistance caseload costs estimate, prepared in August to include the anticipated impact of the reduction in the monthly payment, projects expenditures of \$27.4 million in fiscal year 2004 and \$30.8 million in fiscal year 2005, or expenditures of \$5.3 million less than the 2005 biennium appropriation for cash assistance.

The department's most recent analysis of the entire TANF grant anticipates unexpended TANF funds (due to decreases in caseload costs and other factors) totaling \$10.1 million by the end of fiscal year 2005. This balance will increase to about \$14.0

million when the TANF high performance bonuses Montana will receive are added to it.

Department staff said that the current plan for use of excess TANF funds provides that:

- the high performance bonus would be expended as follows:
 - \$1 million for child care;
 - \$0.5 million for the Low Income Energy Assistance Program; and
 - \$2.4 million would be placed in "reserve";
- savings generated from reduction in caseload numbers and costs would be expended as follows:
 - \$1.6 million to increase the "reserve" to a total of \$4 million; and
 - \$4.2 million to increase fiscal year 2005 childcare funding to the same level as fiscal 2004; and
- savings generated from reducing fiscal year 2003 expenditures would be transferred to fiscal years 2006 and 2007 to support childcare or employment services.

For additional information please refer to the Legislative Finance Committee, TANF Update report available on the Legislative Fiscal Division website or contact Pat Gervais at pagervais@mt.gov or at (406) 444-1795.

Public Employee Retirement System Unfunded Liabilities...Staff presented a report that identified unfunded liabilities of the Public Employee Retirement System that may cause the Public Employee Retirement Board to request legislation to increase the employer contribution for employee retirement benefits. The unfunded liabilities have resulted primarily from investment losses that occurred over the past three years. The Montana Constitution and state law require that the Public Employee Retirement System be funded on an actuarially sound basis, which means that unfunded liabilities may be amortized over no more than 30 years. The question is whether the amortization period to fund the investment losses will extend beyond the 30-year limit and necessitate an employer rate increase. For further information, contact Greg DeWitt at gdewitt@mt.gov or at (406) 444-5392.

NorthWestern Corporation Chapter 11 Reorganization...Staff presented a report that addressed potential expenditure and budget issues for state agencies related to NorthWestern Corporation's bankruptcy proceedings. The report discussed various legal standings that could be awarded to state agencies and identified several state agencies that may have an active interest in the proceedings. The Public Service Commission was identified as having specific concerns because of the statutory limitations on increasing expenditure authority outside of direct legislative action. The report noted that several state agencies would have an involvement in the bankruptcy proceedings and that involvement would result in expenditures unanticipated by the 2003 Legislature. It is too

early in the process, however, to determine the extent of the involvement and the level of expenditures. Contact Todd Younkin at tyounkin@mt.gov or (406) 444-2722 for additional information.

Status of the Highway State Special Revenue Account... Staff presented a report on the status of the highway state special revenue account. The account provides the major state funding for the Department of Transportation and shows a \$32.0 million working capital balance improvement for fiscal year 2003 compared to the balance identified in the *Legislative Fiscal Report – 2005 Biennium*. The primary factor behind the improved financial position of the account is fiscal year 2003 appropriation reversions. The fiscal report assumed full expenditure of legislative appropriations while the latest update reflects actual expenditures for fiscal year 2003. For further information, contact Greg DeWitt at gdewitt@mt.gov or at (406) 444-5392.

ECONOMIC AFFAIRS COMMITTEE

Flooding¹ Doesn't Deter Inquiry into Economic Development... After a meeting in which microphones were shut off as water dripped from ceiling tiles into waste baskets, Economic Affairs Committee Chair, Rep. Joe McKenney, said he flashed back to his days in the Navy on an aircraft carrier where danger was ever-present but not always life-threatening. The flooding in nearby offices at the Capitol during the second day of an Economic Affairs Committee meeting didn't quite constitute a clear and present danger worth interrupting the meeting.

As water began seeping through the ceiling tiles from a water pipe that had burst one floor above, the committee was questioning its last speakers of a day devoted to economic development. Two members of the Board of Regents, John Mercer and Mark Semmens, along with Commissioner of Higher Education Sheila Stearns, had outlined their perspectives on how the Montana university system could help promote the state's economic development.

Mercer called the existing governance system a hurdle to future accomplishments, for both the Legislature, with term limits and part-time legislators, and the Board of Regents where, he said, past boards were not as in touch with Montana realities as was needed to act on economic development opportunities. Mercer said the university system could be the catalyst to develop a long-range economic development plan, provide the coordination for keeping plan developers on task, and provide ideas and analysis for improving the system. Citing his past experience as Speaker of the House, when he saw fiscal notes that extrapolated the effects of a fee, for example, Mercer also suggested that the university system could help make fiscal notes more realistic.

¹In case you hadn't heard, a broken water pipe dumped about 300 gallons of water in offices on the second floor of the Capitol. Flooding from the break also damaged offices in the Legislative Services Division, disrupting staff working in Room 136. Undaunted by the inconvenience, affected legislative staff have temporarily relocated and resumed their duties. Maintenance crews are working to restore the offices on the first and second floors.

Semmens emphasized that successful economic development is a team sport. He said that the university system provides a critical link between postsecondary education and economic development, one that can develop human capital in what is increasingly a knowledge-based economy. Among his suggested roles for the university system in economic development were:

- Improve human capital resources.
- Target program development in areas of specific need. (He noted that legislative support in 2003 for a dental hygiene program exemplified this objective.)
- Expand the two-year educational system. Montana does not educate as many of its citizens in two-year colleges, proportionately, as neighboring states do.
- Improve the ability of the university system to transfer the products of research and development to the commercialization stage.
- Emphasize rural development and subcenters of economic development, recognizing that Montana's economy is not monolithic but varies from region to region.
- Improve the scope of financial aid. Semmens said that statistics from the Western Interstate Commission for Higher Education show that other WICHE states provide 6 times more financial aid, on average, than does Montana.

Commissioner Stearns said that the university system's efforts in promoting economic development need to be done in concert with the state as a whole, without losing sight of the values of education and the importance of investing in people to strengthen the economy. In response to questions from committee members, the panelists said that the Board of Regents plan on taking a lead role prior to the next legislative session to bring the state's leaders together to develop a plan to improve the state's economy. "Science and a price tag" will determine the path for economic development, Mercer said. The committee agreed to write a letter to the Board of Regents, legislative leadership, and the governor in support of developing an overall economic development plan for the state.

Montana Economic Developers Association Weighs in on Economic Development... The Montana Economic Developers Association offered recommendations for legislative action to improve economic development. Panelists Dick King from the Missoula Economic Development Corp., Joe McClure from the Big Sky Economic Development Authority in Billings, John Kramer from the Great Falls Development Authority, and Paul Tuss from the Bear Paw Development Corp. in Havre discussed what their local regions need from the Legislature to help boost economic development. Help with employee training and cost of capital were two key requests. The panelists also reviewed MEDA's 2005 legislative wish list, which includes requests to:

- create an economic development trust within the Coal Tax Trust Fund;
- levy a progressive gross receipts tax on "big box stores", possibly to help fund economic development; and
- eliminate the "trigger" that would reduce incrementally the property tax rate on class eight business equipment to zero.

MEDA members said that they now support a tax on big box stores because box stores rarely participate in local economic development efforts. Tuss said that this tax proposal has probably received more support from large and small economic development groups in MEDA than other issues.

Other Committee Business...The committee also met on Oct. 23 to hear updates on the activities of the Board of Livestock and the Department of Agriculture and to review the progress on the SJR 17 proposal to simplify workers' compensation statutes. The committee decided to:

- write a letter to the U.S. Department of Commerce urging action to resolve a softwood lumber dispute with Canada. The dispute is preventing disbursement of up to \$1.6 billion in a displaced workers fund related to softwood lumber imports.
- gather information from Montana businesses that cannot move forward on sales of meat until the Department of Livestock hires more meat inspectors;
- continue monitoring the SJR 17 study of ways to simplify workers compensation laws;
- gather information on how other states encourage economic development; and
- include in the work plan a session aimed at developing legislation on venture capital.

Meeting materials or links to materials are available on the Economic Affairs Committee's website. Go to <http://www.leg.state.mt> and highlight "Interims" then click on "2003/2004 Interims" and follow the links to Economic Affairs. Minutes will be posted as soon as they are available. For more information, please contact Pat Murdo, committee staff, at (406) 444-3594 or pmurdo@mt.gov.

TIME AND TIDE

Event

Days remaining

Special session	?
Target date for completion of interim committee work (September 15, 2004)	320
General election (November 2, 2004)	368
59th Legislature convenes (January 3, 2005)	430

THE BACK PAGE

UTILITY BANKRUPTCY BASICS

By Mary Vandenbosch, Research Analyst
Legislative Services Division

INTRODUCTION

Recent bankruptcy cases involving offspring of the former Montana Power Company (Touch America and NorthWestern Energy) have necessitated a high-speed ascent of the steep learning curve associated with bankruptcy law.

This article was written for the layperson who wishes to understand the potential implications of a voluntary filing¹ by a utility under Chapter 11 of the federal Bankruptcy Code, as well as actions that are taken or decisions that are made during a bankruptcy proceeding. It is not intended to be a legal resource.

U.S. Bankruptcy Court judge Robert Grant wrote:

The Bankruptcy Code is not a fragmented and disconnected collection of miscellaneous rules. It is a complex tapestry of ideas. The colors and patterns that are woven into its fabric combine to compliment [sic] and reinforce each other, in order to create a single unifying theme--the equitable treatment of creditors and financial relief for over-burdened debtors.^a

Judge Grant noted that the tapestry balances and harmonizes the tensions between seemingly inconsistent objectives. He further emphasized that interpretations of the federal Bankruptcy Code must reflect the interplay between all of its parts, so the code can operate as a coherent whole.

Leaving the picturesque metaphor aside, bankruptcy law is complex and interpretation of the law requires experience. Furthermore, as a practical matter, bankruptcy cases are different from other legal proceedings. Readers should heed the following caveats:

- This article discusses general concepts. The federal Bankruptcy Code is full of exceptions that are generally not identified in this brief piece.
- The case law for utility bankruptcy is not well developed. This means that disputes about the law have generally been decided by lower courts. If these questions are appealed to higher courts, the case law may evolve.

¹A petition initiating a bankruptcy case may be filed by either the debtor or creditors. A petition filed by the debtor is a "voluntary" petition.

- The advice of an attorney who specializes in bankruptcy and has experience with utility bankruptcies is invaluable.²

BASIC CONCEPTS

What is the goal? The bankruptcy laws provide a way for debtors that cannot pay off their debts to make a fresh start.³ In a nutshell, the process leads to a determination of how much of the debt will be paid, to which creditors, and under what terms. A utility that petitions for bankruptcy under Chapter 11 is usually striving to continue its operations by restructuring its debt. However, Chapter 11 also provides an orderly process for liquidation of assets, if liquidation is in the best interest of the creditors.

With respect to creditors, the goal is equitable treatment of creditors within the same class.

Who's on first? Under the U.S. Constitution, the federal government has jurisdiction over bankruptcy. Bankruptcy cases are adjudicated in bankruptcy courts, which are part of the federal district court system. State and federal nonbankruptcy laws may be preempted under certain conditions.

Different chapters for different debtors. There are five different types of bankruptcy cases that are addressed in separate chapters of the U.S. Bankruptcy code. Chapter 7 and Chapter 11 are the two options for an investor-owned utility. In general, Chapter 7 governs cases where the debtor's assets are liquidated and the proceeds are used to pay creditors. Chapter 11 cases usually involve reorganization of the debtor's assets. When a Chapter 11 petition is filed, the debtor usually wants to continue operating the business post-bankruptcy. Future earnings of the debtor may be used to pay creditors.

As noted earlier, there are always exceptions. The debtor may liquidate its assets under Chapter 11 as was done in the Touch America case.

The petitioner chooses the chapter that will govern its case at the time of filing. However, the law provides for conversion of a Chapter 11 case to a Chapter 7 case or vice versa. The switch may be voluntary (initiated by the debtor) or involuntary.

TERMS OF THE TRADE

A layperson observing a bankruptcy case will quickly become entangled in jargon. A few frequently used terms are explained below.

Claim. A right to payment. Claims are divided into classes of substantially similar claims.

²I acknowledge the sage advice of my "little" brother, Dave Vandenbosch, who unlike his sister, has practical experience with bankruptcy proceedings.

³Interestingly, the legal term for this "fresh start" is "rehabilitation."

Cram down. Confirmation of a plan that is not accepted by every class of claims.

Creditor. A party that is owed money by the debtor.

Debtor. The utility that owes money to persons, corporations, governments, etc., and that seeks to reorganize its debts through bankruptcy.

DIP. An acronym for debtor-in-possession, which is a debtor that is in possession of the assets and that operates the business during the bankruptcy proceeding. In some cases, a trustee is appointed; however, this is rare in Chapter 11 cases. (Occasionally used to refer to the Cubs fan who deflected the baseball from Moises Alou during the 2003 National League Championship series. I have avoided the use of this acronym to minimize confusion.)

Discharge of debt. If a debt is discharged, the debtor has no further liability with respect to that debt. The creditor may not try to collect the debt from the debtor; however, the discharge does not cancel the obligation. Other parties may still have an obligation with respect to the discharged debt. A discharge does not eliminate liens. Once the case is concluded, the creditor may seek to obtain its collateral.

Executory contract. A contract that is unfulfilled on both sides. For example, NorthWestern Energy has unfilled contracts with energy suppliers. The supplier still has an obligation to provide gas or electricity and NorthWestern Energy has an obligation to pay the supplier for the energy.

Lien. Defined in the U.S. Bankruptcy Code to mean a "charge against or interest in property to secure payment of debt or performance of an obligation."

Secured claim. A claim secured by a lien or that is subject to setoff.⁴

Setoff. Under certain circumstances, a creditor may offset a mutual debt owed by the creditor against the creditor's claim.

POLICIES, PRINCIPLES, AND POWER

The rules change when a petition is filed. Significant policies and principles are described below.

Management goal. Before the utility files for bankruptcy, the company is operated to maximize profits for shareholders. However, after the petition is filed, the utility must be operated to maximize the value of the bankruptcy estate primarily for creditors.

⁴The amount owed by the debtor is considered a secured claim only to the extent that it is secured. For example, if the debtor owes \$100,000 and \$50,000 of that is secured, then the creditor has a \$50,000 secured claim and a \$50,000 unsecured claim.

The filing of a bankruptcy petition operates as an automatic stay that prohibits several categories of activities. Two of these are highlighted below:

An act to obtain property of the estate or to exercise control of property of the estate is prohibited. For example, a creditor may not contact a debtor to demand repayment, take action against a debtor to collect money owed, take property of a debtor, or start or continue foreclosure actions or repossession. Not all property is considered property of the estate.

The commencement or continuation of a judicial, administrative, or other action or proceeding against the debtor, whether or not the action was initiated prior to the filing, is also prohibited, subject to several exemptions. There are varying interpretations of what this provision means. Several motions and objections have been filed regarding the automatic stay in the NorthWestern Corporation case.

The stay can be terminated or modified for cause.

Preemption. The federal bankruptcy code preempts *certain* nonbankruptcy laws, but not all bankruptcy laws. Generally, the courts have held that nonbankruptcy laws otherwise applicable to the "restructuring transactions necessary to an effective and feasible reorganization" are preempted by the bankruptcy code.⁵ Based on the current case law, a state law or regulatory order or a federal law cannot prevent a restructuring transaction or take an action that diminishes the value of the estate. However, other laws still apply.

Ratemaking. The Public Service Commission can continue its normal ratemaking activities during the bankruptcy case. However, orders that reduce the value of the estate may be prohibited by injunction.

A done deal can be undone. The debtor-in-possession may avoid certain transfers of money or property and may even recover certain transfers that occurred before the bankruptcy petition was filed. The debtor must assume, assign⁵, or reject executory contracts. Court approval is required for assumption or rejection. For example, NorthWestern Energy could reject contracts with energy suppliers, including qualifying facilities.⁶ A party to a breached contract may file a claim.

Priority of claims. The U.S. Bankruptcy Code establishes a priority for payment of expenses and claims. If each class of claims corresponded to a floor of a building, with the first floor having the first priority, all claims on the first floor would be paid before any

⁵Transfer to another.

⁶Qualifying facilities that meet certain criteria under federal and state law qualify for special prices.

claims on the second floor, and so on. The claims on the top floor would only be paid after claims on all other floors have been paid in full. (Assume there is no basement.)

The priority of expenses and claims for a voluntary case is established in the law as follows:

1. Secured claims.
2. Administrative expenses. This category is broader than normal usage of this phrase implies. It includes the expenses necessary to continue the operation of the utility during the case.
3. Unsecured claims. Claims that are likely in a voluntary utility bankruptcy are listed in order of priority below.
 - a. Wages, salaries, commissions, and related costs.
 - b. Allowed claims for contributions to an employee benefit plan.
 - c. Deposits for services not provided.
 - d. Amounts owed governmental units for certain taxes and associated penalties.
 - e. Commitments to a federal depository institution's regulatory agency to maintain the capital of an insured depository institution.
 - f. Other unsecured claims.

PROCESS: STEPS IN A VOLUNTARY CHAPTER 11 BANKRUPTCY PROCEEDING

Key steps in a bankruptcy proceeding are listed below.⁶ The debtor-in-possession usually continues to operate the business for the duration of the proceeding. Alternatively, a trustee may be appointed to operate the business; however, this is not common in Chapter 11 cases. Transactions that are not in the ordinary course of business must be approved by the bankruptcy court.

1. The debtor files a petition. Filing of the petition triggers the automatic stay.
2. Creditors are notified and organized. The court appoints one or more committees to represent creditors and may appoint a committee of equity security holders.
3. A reorganization plan is filed. The debtor is the only party that has the right to file a plan within the first 120 days of filing the petition. If the debtor files a plan within 120 days, no other plan may be filed within 180 days of commencement of the case. The court may extend the period during which the debtor has first dibs on filing a plan. More than one plan may be filed, but only one plan may be confirmed.
4. Those with allowed claims vote to accept or reject the plan. Acceptance of the plan requires approval by at least two-thirds in amount and more than one-half in number of the allowed claims in the class.

5. The bankruptcy judge confirms the plan if it meets statutory criteria. The judge may not approve an accepted plan if it does not fulfill the requirements. The judge may confirm a plan that has not been accepted by all classes if: at least one impaired class of claims has accepted the plan; the plan does not discriminate unfairly; and the plan is fair and equitable with respect to each class of impaired claims that has not accepted the plan. The judge is not required to consider the public interest.
6. If a rate change is part of the plan, the plan may not be confirmed unless the Public Service Commission approves the rate change.

A Chapter 11 case often lasts three years or more.⁷

The NorthWestern Corporation Case

NorthWestern Corporation, the parent company of NorthWestern Energy, filed a bankruptcy petition under Chapter 11 on September 14, 2003.

Entities subject to restructuring. NorthWestern Energy was included in the bankruptcy petition while two nonutility subsidiary companies (Blue Dot Services, Inc. and Expanets, Inc.) were not. NorthWestern Corporation officials have explained that they intend to sell these businesses and believe that they would obtain better value by selling the companies outside of bankruptcy. The sale is subject to approval by the Bankruptcy Court.

Status. The deadline to file proofs of claim is January 15, 2004. (Coincidentally, the deadline is April 15, 2004 (tax day), for governmental units. Several new documents (motions, orders, etc.) are filed each week. An update on the status would be outdated before *The Interim* arrives in subscribers' mailboxes. An interested person can track the case online at this website: www.kccllc.net/northwestern/

Effect on energy services. When NorthWestern Corporation filed for bankruptcy, the corporation's cash flow improved for two reasons: Northwestern was able to obtain "DIP financing," which is only available to debtors in a reorganization case; and the automatic stay prevents collection of debts. Like other utilities that have reorganized under Chapter 11, NorthWestern Energy should continue operating in the near future as it did before the bankruptcy. The long-term effect of bankruptcy on provision of services and rates depends on the plan of reorganization that is confirmed by the judge.

State participation. Montana's Consumer Counsel and Public Service Commission are already participating in the case. These government entities can make motions, object to motions, and even propose a plan of reorganization. They cannot vote on the plan.

Any government entity that is a creditor may participate in the case and vote on the reorganization plan. For example, in mid-September NorthWestern Energy owed money

to the Department of Natural Resources and Conservation for power purchased from the Broadwater Power Project. If the Department filed an allowed claim, the Department could participate as a creditor.

The Energy and Telecommunications Interim Committee sent a letter requesting the following information from parties that may represent the state's interests in the NorthWestern Corporation bankruptcy proceeding: parties participating and the capacity in which they are participating; the cost of participation in the bankruptcy proceeding; and the parties' plan to coordinate efforts in order to maximize efficiency and minimize counterproductive actions.

MORE INFORMATION

More information about bankruptcy in general, and the NorthWestern Corporation bankruptcy in particular, is available on the website for the Energy and Telecommunications Interim Committee: www.leg.mt.gov/css/committees/interim/2003_2004/energy_telecom/bankruptcy.asp

ENDNOTES

- a. In re Depew, 115 BR. 965 (Bankr. N.D. Ind. 1989), 123
- b. In re Pacific Gas and Electric Co, 283 B.R. 41 (N.D. Cal. 2002)
- c. David G. Epstein, Bankruptcy and Related Law in a Nutshell, West Group, St. Paul, Minnesota, 2002.
- d. *ibid*, p. 268.



UNLESS OTHERWISE SPECIFIED,
ALL ROOM DESIGNATIONS ARE IN THE CAPITOL BLDG.

INTERIM CALENDAR

NOVEMBER

November 11, Veteran's Day, holiday

November 16, SJR 32 Subcommittee on Medical Liability Insurance, Billings, Deaconess Hospital, 6:30 p.m.

November 17, SJR 32 Subcommittee on Medical Liability Insurance, Billings, St. Vincent's Hospital, 8:30 a.m.

November 20, Energy and Telecommunications Committee, Room 102

DECEMBER

December 5, State-Tribal Relations Committee

December 5, Legislative Finance Committee, Room 102, 8:30

December 11, Revenue and Transportation Committee, Room 137, 9 a.m

December 12, Revenue and Transportation Committee, Room 137, 8:30 a.m.

December 17, Legislative Audit Committee, Room 102, 8:30 a.m.

December 18, Legislative Audit Committee, Room 102, 8:30 a.m.

December 25, Christmas Day, holiday